IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.3164 OF 2007
IN
SUIT NO.418 OF 2002

Housing Development Finance Corporation Ltd. ..Plaintiffs.

V/s.

Pervin B. Mehta & Anr. ..Defendants.

Mr.Milind Vasudeo a/w Amit Pradhan i/b. Wadia Gandhi & Co. for Plaintiffs.

Mr.Rishabh Shah i/b.Pandya Gandhi & Co. for Defendant Nos. 1 and 2.

CORAM: A.M.KHANWILKAR,J

DATE : SEPTEMBER 4, 2007.

P.C. :

1. Both sides have addressed this Court at length on the prayers made in the Notice of Motion under consideration. For the nature of order that I propose to pass in the context of the prayer in my opinion, it is appropriate to finally dispose of the Motion. Accordingly, as the parties were fully heard, the Motion is proceeded for final disposal forthwith.

2. The Plaintiffs have filed present Motion for the following reliefs:

(a) that this Hon’ble Court be pleased to permit the Plaintiffs to take recourse to one or more measures in exercise of their powers under the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) for the purpose of enforcement of security interest created by Defendant Nos.1 and 2 in favour of the Plaintiffs with respect to the Suit Flat/Secured Asset i.e. Flat No.12, 2nd floor, Plot No.15, Sea Breeze, New India CHS Ltd., JVPD Scheme, Juhu, Mumbai-400 049;

(b) that this Hon’ble Court be pleased to direct the Court Receiver, High Court, Bombay to hand over actual and physical possession of the Suit Flat to the Authorised Officer of the Plaintiffs upon expiry of the 60 days period of the Demand notice to be issued by the Plaintiffs under section 13 of the SARFAESI Act;

(c) that this Hon’ble Court be pleased to direct the Court Receiver, High Court, Bombay to continue in actual and physical possession of the Suit Flat/Secured Asset till such time the Authorised Officer of the Plaintiffs takes actual physical possession thereof under the SARFAESI Act and that upon handing over possession of the Suit Flat to the Authorised Officer of the Plaintiffs, the Court Receiver, High Court, Bombay to stand discharged without passing accounts and the entire amount lying with the Court Receiver be paid over to the Plaintiffs;

(d) that the Plaintiffs, upon exercise of its power of sale of the Suit Flat under the provisions of the SARFAESI Act, be entitled to appropriate the entire sale proceeds received therefrom in part satisfaction of its claim in the above Suit;

(e) for ad-interim and interim reliefs in terms of prayer clause (a) to (d) hereinabove;

(f) for such further and other reliefs as this Hon’ble Court may deem fit and proper;

(g) for costs of this Notice of Motion."

3. This Motion has been filed in the Suit praying for recovery of sum of Rs.1,35,19,217/-(Rs.One Crore thirty five lakhs nineteen thousand two hundred seventeen only) from the Defendants towards outstanding house loan account as on 19th December, 2001 with further interest @ 15.5% per annum thereon from the date of filing of the Suit till realisation. The other relief claimed in this Suit is for declaration that Flat No.12 on the second floor, Plot No.15, Sea Breeze, New India CHS Ltd., JVPD Scheme, Juhu, Mumbai 400 049 is validly mortgaged by the Defendants in favour of the Plaintiffs and claim amount is duly secured thereby.

4. It is common ground that the original Title deeds are made over to the Plaintiffs while securing housing loan. The contest is however, only limited to the issue that it is not validly registered mortgage. That issue may arise for consideration in the suit, if it were to be proceeded on merits at the appropriate stage. During the pendency of the suit, it is not in dispute that the Court Receiver has been appointed who is in physical possession of the suit

property.

5. In so far as the present Motion is concerned, the Plaintiffs have filed the present Motion in view of the changed circumstances. According to the Plaintiffs by virtue of notification dated 10h November, 2003 under the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Plaintiffs have been declared as Financial Institution, to be covered by provisions of the said Act of 2002. As a result of the said notification, the Plaintiffs claim that they are entitled to proceed in relation to the Suit property by taking recourse to provisions of the Act of 2002, which is the additional remedy available to the Plaintiffs in addition to the pursuant remedy of Suit before this Court. It is in this backdrop, the Plaintiffs have approached this Court as referred to earlier by way of present Notice of Motion.

6. The reliefs claimed in this Motion are however, opposed by the Defendants on the argument that the Plaintiffs cannot pursue two different forums for recovery of the loan amount. The Plaintiffs will have to elect their remedy. Moreso

because, one of the relief claimed by the Plaintiffs in the Suit filed before this Court is for declaration that the property in question is validly mortgaged by the Defendants in favour of the Plaintiffs. Unless that issue is to be finally resolved by this Court, in the pending Suit, the Plaintiffs cannot proceed with the action under provision of Securitisation Act on the assumption that it is a valid mortgage existing in favour of the Plaintiffs.

7. Having considered rival submissions, I have no hesitation in accepting the argument of the Plaintiffs that remedy under provisions of Securitisation Act is an additional remedy provided to the Financial institutions. This position is no more **res integra.** It will be useful to refer to the decision of the Apex Court in the case of **Transcore V/s. Union of India and Anr.reported in AIR 2007 SC. 712.** The Apex Court while considering the issue of doctrine of election of remedies in the context of Section 19 of Debt Recovery Tribunal Act and Section 13(4) of Non-Performing Assets Act has observed that the remedy is treated as an additional remedy,which is not inconsistent with the DRT Act. Under principle underlying the said exposition, I am

inclined to accept the argument of the Plaintiffs that the Plaintiffs have additional remedy under the provisions of the Securitisation Act, which remedy is not inconsistent with the remedy by way of present Suit. On that finding, the question of invoking doctrine of election of remedies does not arise.

8. The question however, is, whether the objection taken on behalf of the Defendants that until the relief claimed in terms of the prayer clause (b) of the Suit is finally answered by this Court, will it be possible for the Plaintiffs to proceed on the premiss that the mortgage in favour of the Plaintiffs is valid. For answering this objection counsel for the Plaintiffs has rightly relied on the definition of expression "Security Interest" in terms of the Section 2(1)(zf), which is an inclusive term. It postulates that Security interest means right, title and interest of any kind whatsoever upon the property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in section 31 of the Act. The transaction between the Plaintiffs and Defendants of depositing original title deeds in favour of the plaintiffs in respect of the disputed property, it is contended on

behalf of the Plaintiffs will be clearly covered by the sweep of definition "Security Interest" .

9. I do not think it to express any final opinion on that contention. For, that aspect will have to be considered by the authority under the Securitisation Act. The finding so recorded will be binding on the Plaintiffs, who would invoke action under the provisions of Securitisation Act. This is so because, if the prescribed Authority under the Securitisation Act has power to consider that aspect would incidently answer those issues, that may be required to be dealt with to address the controversy raised before it. Needless to observe that it will be open to the Defendants to challenge the opinion of the Authority that the transaction is covered by Security Interest by way of remedy, as may be available under the provisions of Securitisation Act, 2002 or such other remedy, as may be permissible by law.

10. Thus understood, the fact that the present Suit would remain pending in this Court in relation to the relief in terms of prayer clause (b) of the Suit will not inhibit the Authority under Securitisation Act to examine matters which will be

incidental to the question as to whether the claim of the Plaintiffs is covered by sweep of expression "Security Interest", for which reason the Plaintiffs can proceed to invoke provisions of Securitisation Act.

11. All questions in that behalf will have to be addressed on its own merits in accordance with the law. For the reasons recorded earlier, I have no hesitation in acceding to the request of the Plaintiffs to allow this Notice of Motion in terms of prayer clause (a) to (d), which are reproduced earlier.

12. Accordingly, this Notice of Motion is made absolute in terms of prayer clause (a) to (d). No order as to costs.

(A.M.KHANWILKAR,J)